were in fact two companies, with almost identical names. One was an Irish company (Harris Engineering Company Ltd.), and the other was an English company (Harris Engineering Company (Leeds) Ltd.). The Irish company, which was the employer, carried on business from an address which was also the registered office of the English company. So the opportunity for confusion was manifest. By mistake, the defendant named in the writ was the English company. When the mistake was discovered, which was after the three years had elapsed, the plaintiff sought to amend the proceedings by substituting the name of the Irish company for the name of the English company pursuant to Rules of the Supreme Court, Order 20, rule 5, which gave the Court power in a case of mistaken identity to substitute a new defendant for the defendant originally sued, notwithstanding that a relevant period of limitation had expired. It was submitted on behalf of the employer that the rule was *ultra vires* because it enabled the court to divest a defendant of an accrued right. The argument failed, rightly in their Lordships' view.

Lord Denning M.R. (at page 718) said that:–

"Whenever a writ has been issued within the permitted time, but is found to be defective, the defendant has no right to have it remain defective;"

while Russell L.J. put the matter thus (at page 720):–

"It was argued that before the amendment, the Irish company had a sure shield under the statute and the amendment removed that shield. But its sure shield under the statute was one which was available to it in another action should one be brought out of time. Its shield in the present proceedings was not the statute, but the fact that it was not yet a defendant in them. That shield could be taken away by the procedural power of permitting amendment of these proceedings."

Their Lordships consider that there is an alternative, and perhaps preferable, approach to the *Mitchell* type of case. Not only did the two companies have a common English address, but they also had common directors and a common secretary. It was obvious to all who were concerned on behalf of the two companies that the plaintiff intended to sue his employer and that those advising the plaintiff believed that the name of his employer was correctly written as Harris Engineering Company (Leeds) Ltd. It was fortuitous that a company bearing the latter name actually existed. Had there been no such company in existence, the plaintiff's right to correct the name of the defendant would have been beyond argument. No one was misled by the use of the mistaken name in the proceedings, and the case resolves itself into one of mere misnomer which was clearly within the Court's corrective power under Order 20, rule 5: see *Whittam* v. *W.J. Daniel & Co. Ltd.*[8]. So analysed the result of the *Mitchell* case is in no way inconsistent with the view which their Lordships take in the present case. The only other comment which their Lordships would make on the decision in the *Mitchell* case is that they do not accept the generality of the proposition stated by the learned Master of the Rolls that:–

"The Statute of Limitations does not confer any right on the defendant. It only imposes a time limit on the plaintiff."

In the opinion of their Lordships an accrued entitlement on the part of a person to plead the lapse of a limitation period as an answer to the future institution of proceedings is just as much a "right" as any other statutory or contractual protection against a future suit.

The case of *Noor Mohamed Yousoff* may call for further consideration on an appropriate occasion.

For the reasons indicated, their Lordships will advise His Majesty the Yang di-Pertuan Agong that the appeal should be dismissed. The appellants must pay the respondents' costs.

Appeal dismissed.

Solicitors: *Le Brasseur & Bury; Coward Chance.*

LETCHUMANAN CHETTIAR v. PALANIAPPA CHETTIAR

[P. C. (Lord Hailsham of St. Marylebone L.C., Lord Scarman, Lord Roskill, Lord Brandon of Oakbrook and Lord Templeman) October 6 & November, 15, 1982]
[Privy Council Appeal No. 32 of 1981]

Land Law – Caveat – Application for removal of caveat – Consent order for sale of land – Implied obligation to withdraw caveat.

The appellant and the respondent in this case were stepbrothers. Their father was the Karta or manager of a joint family estate which included land at Port Dickson regis-

tered in the name of the Karta and held under Hindu law in trust for the Karta, the appellant and the respondent in equal shares. On April 2, 1951 the respondent brought a civil suit asserting that all property held by the Karta belonged to the joint family estate and claiming an account of the amount due to the respondent from the joint family estate or from the Karta. In aid of his civil suit the respondent lodged a caveat against lands registered in the name of the Karta. By a subsequent consent order made in the proceedings the caveat was ordered to be withdrawn with the exception of the caveat in respect of Lot 538 in the town of Port Dickson, which was ordered to remain registered "until further order of the court" against the said lot.

In 1964 a receiver of the joint family estate was appointed. In 1974 the Privy Council on appeal in the civil suit proceedings reported their opinion that the accounts of the joint Hindu family estate should be supplied from July 15, 1950. (See [1974] 2 M.L.J. 133). The Karta died in 1972. In 1973 the appellant initiated a probate suit in the High Court. In 1977 the Federal Court on appeal ordered that the probate of the will of the Karta be granted to the appellant "subject to the proviso that before disposing of or distributing any property bequeathed under the will or the proceeds of such property, there shall be an order to that effect (See [1978] 1 M.L.J. 120).

The respondent alleged maladministration and breaches of trust by the Karta and the appellant in connection with joint family estate.

In 1978 the appellant applied by originating summons for leave to sell Lot 538. In his affidavit the appellant explained that when the joint family estate was put into the hands of the receiver, the Karta in his lifetime and the appellant after his death were forced to borrow money at high rates of interest. The appellant wished to discharge these borrowings out of the two-thirds share of the proceeds of Lot 538 attributable to the Karta and the appellant and to invest any balance in high yielding securites. In 1979 an order was made with consent of the appellant and the respondent for leave to sell Lot 538 for a minimum price of $1,239,213.50. It was ordered that the net proceeds of sale after payment of taxes should be divided as to two thirds to the appellant and one-third to the respondent. For the purpose of effecting registration of the transfer to the purchaser, the receiver was directed to release the documents of title to the appellant.

The respondent was asked to withdraw the caveat but he declined to do so unless the Karta's share of the net proceeds of sale was placed on deposit as security for the claims of the respondent against the Karta's estate. The appellant applied by summons for an order that the caveat be removed and cancelled. Ajaib Singh J. ordered the caveat to be removed and cancelled but the Federal Court allowed the appeal against the order. (See [1981] 2 M.L.J. 127.)

The appellant with the leave of the Federal Court appealed to the Yand di Pertuan Agong.

Held, allowing the appeal: when the respondent freely and voluntarily consented to the sale for the purposes which had been revealed by the appellant and subject only to the conditions specified in the consent order, the respondent became subject to an implied obligation to do nothing to prevent the terms of the order being carried into effect. He became under a duty to withdraw the caveat whose continued existence prevented the order being carried into effect. As he had declined to withdraw the caveat voluntarily, the court had power under the National Land Code to order the caveat to be withdrawn and cancelled.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

P.S. Gill (*Frank McWilliams* with him) for the appellant.

Stephen Hunt for the respondent.

Cur. Adv. Vult.

Lord Templeman (delivering the judgment of the Board): The appellant and the respondent are step-brothers. Their father was the Karta or manager of a joint family estate which included land at Port Dickson in Malaysia in the name of the Karta and held under Hindu law upon trust for the Karta, the appellant and respondent in equal shares.

On April 2, 1951 the respondent initiated civil suit No. 34 in the Seremban High Court asserting that all property held by the Karta belonged to the joint family estate and claiming an account of the amount due to the respondent from the joint family estate or from the Karta.

In aid of his civil suit, the respondent lodged a caveat against lands registered in the name of the Karta. By a consent order date March 17, 1958 made in the civil suit proceedings the caveat was ordered to be withdrawn with the exception of grant No. 8457 for lot 538 in the town of Port Dickson. The caveat was ordered to remain registered "until further order of the Court against the said grant No. 8457 for lot No. 538".

By section 166 of the Land Code (Cap. 138 of Title XVII of the Laws of the Federated Malay States (1935)) a beneficiary under a trust or any person claiming title to or registerable interest in land may present a caveat to the effect that such land shall not be transferred, charged or leased by the proprietor. By section 169 so long as any caveat shall remain in force the proper registering authority shall not register any memorandum of transfer charge or lease executed by the proprietor of such land. By section 170 the proprietor of the land may move the court to direct removal of the caveat. By section 173 the caveator may by notice to the proper registering authority withdraw his caveat at any time. The Land Code has now been replaced by similar provisions in the Malaysian National Land Code contained in Act 56 of 1965.

In 1964 a Receiver of the joint family estate

was appointed. In 1974 the Board, on appeal in the civil suit proceedings, reported their opinion that accounts should be supplied of the Hindu joint family estate from July 15, 1950.

The Karta died on November 19, 1972.

In 1973 the appellant initiated Probate Suit No. 1 of 1973 in the High Court at Seremban. On September 24, 1977 the Federal Court in Malaysia on appeal ordered that probate of the will of the Karta be granted to the appellant "subject to the proviso that before disposing of or distributing any property bequeathed under the will or the proceeds of such property, there shall be an order to that effect".

The respondent now alleges maladministration and breaches of trust by the Karta and by the appellant in connection with the joint family estate.

On November 25, 1978 the appellant issued an Originating Summons No. 126 of 1978 in the Seremban High Court asking for leave to sell lot 538. In an affidavit sworn on November 21, 1978 the appellant explained his wish to sell lot 538 by deposing that after 1964 when the joint family estate was put into the hands of the receiver, the Karta in his lifetime and the appellant after his death were forced to borrow money at high rates of interest. The appellant wished to discharge these borrowings out of the two-thirds share of the proceeds of lot 538 attributable to the Karta and the appellant and to invest any balance in high yielding securities.

By an order made on February 5, 1979 with the consent of the appellant and the respondent who appeared by their respective counsel leave was granted to the appellant to sell lot 538 for a minimum price of $1,239,213.50. It was ordered that the net proceeds of sale after payment of taxes should be divided as to two-thirds to the appellant and one-third to the respondent. For the purpose of effecting registration of the transfer to the purchaser, the receiver was directed to release the documents of title of lot 538 to the appellant.

On April 19, 1979 the respondent was asked to withdraw the caveat lodged against lot 538 in the civil suit in order that the sale authorised by the consent order of February 5, 1979 might proceed. The respondent declined to withdraw the caveat unless the Karta's share of the net proceeds of sale was placed on deposit as security for the claims of the respondent against the Karta's estate.

On June 30, 1979 the appellant issued a summons in the Seremban High Court in the originating summons proceedings asking for an order that the caveat against lot 538 be removed and cancelled.

By an order dated August 22, 1979, Ajaib Singh J. ordered the caveat to be removed and cancelled.

By an order dated October 1, 1980 the Federal Court in Malaysia allowed the respondent's appeal against the order of Ajaib Singh J. The appellant with the leave of the Federal Court appeals to the Yang di-Pertuan Agong.

When the respondent registered and maintained his caveat against lot 538 he did so in order to protect his claim in respect of the joint family estate. The protection afforded by the caveat included the power of the respondent to prevent a sale of lot 538 unless the court ordered the caveat to be withdrawn.

When the court in the probate action directed that the Karta's property should not be disposed of or distributed the order was made in order to protect the respondent's claims in respect of the joint family estate. The protection afforded by the order included the power of the respondent to prevent a sale of lot 538 unless the court authorised a sale.

When the appellant sought leave to sell lot 538 he made it quite clear that he intended, if leave were granted, to dispose of two-thirds of the net proceeds of sale by settling the debts of the Karta's estate and the debts of the appellant and by investing any balance. He offered to allow, and the consent order did allow, one-third of the net proceeds of sale to be handed over to the respondent.

When therefore the appellant sought leave to sell lot 538, the respondent was faced with a choice. He could consent to a sale unconditionally or on condition that part of the net proceeds of sale be placed on deposit or otherwise secured to protect the claim of the respondent in respect of the joint family estate. Alternatively he could oppose a sale. In the event the respondent chose to consent unconditionally to a sale. His consent was given by counsel on his behalf and was embodied in a consent order which contractually bound the respondent and prevented him from withdrawing

his consent and prevented him from seeking to impose conditions on the sale other than the conditions as to price and otherwise which are embodied in the consent order.

On behalf of the respondent it was submitted that the respondent's consent to a sale contained in the consent order dated February 5, 1979 did not affect the protection afforded to the respondent by the caveat. But after consenting to a sale the respondent could no longer prevent a sale. He became under a duty to withdraw the caveat in order to enable the sale to take place and on his refusal to withdraw the caveat the court has power to order withdrawal and cancellation.

It was submitted that the order for withdrawal of the caveat made by Ajaib Singh J. was not effective because the order was not expressed to be made in the civil suit proceedings. But Ajaib Singh J. clearly had jurisdiction under the Land Code legislation to order the withdrawal of the caveat in any proceedings to which the respondent as caveator was a party. Ajaib Singh J. rightly exercised that power because, as he said in his judgment, the respondent's "refusal to vacate the caveat was not justifiable. He was now placing obstacles to thwart the order to which he had consented on February 5, 1979".

The Federal Court was influenced by the assertion that the respondent overlooked his caveat when he gave consent to the sale. But whether in proceedings relating to the caveat or in proceedings relating to the limitations imposed by the order made in the probate proceedings, the choice of the respondent, which was to oppose or to allow the sale, was affected by the same considerations. He could either fight to prevent a sale in order to protect his remedies and maintain the pressure of his civil suit or he could consent to a sale and accept the proffered share of the net proceeds of sale. The Federal Court said that because "the parties' minds were not directed to the caveat ... the consent given in the circumstances must be treated as being subject to the legal limitations and encumbrances under the title, more so when in applying for the order of sale no mention was made of any limitation and encumbrance". But the only relevant encumbrance was the caveat and the consent could not have been made subject to the caveat which if it continued to exist wholly nullified the effect of the order. The continued existence of the caveat prevents the sale to the purchaser authorised by the consent order or at any rate prevents any sale at the minimum price stipulated by the consent order and exceeding $1,000,000.

Their Lordships consider that when the respondent freely and voluntarily consented to a sale for the purpose which had been revealed by the appellant and subject only to the conditions specified in the consent order, the respondent became subject to an implied obligation to do nothing to prevent the terms of the order being carried into effect. He became under a duty to withdraw the caveat whose continued existence prevents the order being carried into effect. In breach of that duty he declines to withdraw the caveat voluntarily. In their Lordships' opinion, in exercise of the powers conferred on the court under the Land Code, the caveat ought to be withdrawn and cancelled.

Accordingly their Lordships will advise His Majesty the Yang di-Pertuan Agong that the appeal against the decision of the Federal Court ought to be allowed and the order made by Ajaib Singh J. restored. The respondent must pay the appellant's costs of the proceedings before Ajaib Singh J., the Federal Court and the Board and such costs may be deducted from the one-third of the net proceeds of sale of lot 538 which is payable to the respondent.

Appeal allowed.

Solicitors: *Kingsford Dorman; Bulcraig.*